No. 218.

Reply Brief of Plaintiff in Error.

Filed Nov. 28, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

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ROBERT DUNLAP, *Appellant,*

v.

THE UNITED STATES.

Brief in Reply.

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BRIEF IN REPLY.

The brief for the United States discusses comprehensively all the issues involved in this case. On most of these questions the views of counsel for the appellant have been already laid before the court in their opening brief. Only the following positions seem now to require special reply:

1. That "regulations were to be prescribed before any right to rebate could exist" (p. 9) and that "the statute itself postpones the existence of the right until the Secretary of the Treasury has performed the act called for by the statute, viz., the prescribing of regulations" (p. 39).

2. That the act contemplated constant official supervision (pp. 18–20), and by its omission of any appropriation to pay the necessary officers (p. 63), the vagueness of its definition of terms (p. 48), and the dangers of fraud (pp. 23, 50–53), was necessarily inoperative till such a corps of officers were appointed and in the performance of their duties (p. 10).

3. That, the Secretary of the Treasury having reported that "he could not execute the section until Congress took further action" (p. 25), and Congress having taken

"no steps to require the Secretary to entertain such claims is conclusive proof that Congress had originally intended that unless the Secretary" prescribed regulations "no claims for rebate should be entertained" (p. 26).

4. That no rebate can be paid on alcohol on which the tax was paid prior to August 28, 1894 (pp. 104–111).

We shall submit our views on these four propositions in their order, and in addition a few observations of a miscellaneous character.

1. The Act Took Effect Immediately.

The Government insists (brief, p. 9) that "regulations were to be prescribed before any right to rebate could exist," that (p. 10) the Secretary "would have been allowed a reasonable time before he could be called on to prescribe the regulations"; that (p. 11) "until the regulations had been prescribed, no right to rebate arose" and consequently that "as the regulations never were prescribed, there never was any right to rebate at all."

The fallacy of this argument consists in assuming that officers of the Government when required to take steps to carry out a statute are entitled to an indefinite time for their action. The argument is at war with every principle of statutory construction.

No doubt it is in many cases more convenient, that statutes should take effect at a future day rather than immediately. The constitutions of many States provide that, except in particular cases, statutes shall take effect only a certain time after their enactment. Although no such restrictions bind Congress, it is not unusual for an act of Congress to provide that it shall go into effect at some future date. This is particularly true with regard to revenue laws. Thus, the revenue act of March 3, 1883, 22 Stat. L. 488, provided that those portions relating to internal revenue should go into effect on the

following first of May, and those in regard to customs on the first of July, thus giving about two months of time for preparation for the former and four months for the latter. There could be no question of the duty of the Secretary of the Treasury to have all regulations required by that act put into execution on the respective days named.

The fact that the time actually given for putting the act into effect is very short forms no reason for postponing its operation.

Thus, the next general revenue act, that of October 1, 1890, 26 Stat. L. 567, by express terms went into effect on the sixth of October, 1890, only five days from its passage. Notwithstanding the shortness of time allowed it was never claimed that either officers or citizens were entitled to more to prepare for its going into operation.

The act of August 28, 1894, under which the present claim arises, provided in terms that its tariff provisions should go into effect on the first of August, 1894. It did not become a law till the 28th of that month. It was held (*United States* v. *Burr*, 159 U. S. 78) that it went into effect only on that day. The only question was whether the act went into effect on the 1st of August or on the 28th. There was no contention that it was intended to take effect only on a future day, although an examination of the journals of the two Houses led this court to the conclusion that the purpose at each legislative step had been throughout to fix a date after its passage for its operation.

The fallacy of the argument for the United States consists in assuming that, in the absence of a specified future date for the taking effect of this act, the officers of the Government were entitled to take their own time about putting any of its provisions into effect. No such question could have been raised if the act had followed the

usual course of revenue acts, and had provided for taking effect at some future date. The argument is thus seen to be a mere argument *ab inconvenienti*. No such inconvenience actually occurred in regard to this act. It was held by the President for the constitutional limit of ten days. During this time the Treasury Department had an opportunity to prepare for putting all its provisions into effect.

Citizens have never been excused from paying duties at increased rates going into immediate operation because time was not granted them to adjust their business relations to the new state of things. Why should officers of the Government be entitled to any different rule?

Can the Law be Limited by the Executive?

The argument for the Government is that there can be no recovery under this act without regulations.

The claimant has pointed out that the effect of this position is to place the taxpayer entirely under the control of the Secretary of the Treasury—he being charged with, or free from, tax according to the Secretary's discretion.

Accepting the logical consequences of the position that the purpose of Congress was that there should be no recovery unless the alcohol had been used under regulations, it would make no difference whether the Secretary disobeyed the law in full by failing to prescribe regulations; whether he prescribed unreasonable regulations; or whether, after prescribing lawful regulations, he failed to carry them out or revoked them. This court in the *Campbell* case treated these conditions as identical.

The regulations proposed by the Secretary but never promulgated (Record, p. 10, article 1) defined a manufacturer as one who "manufactures for wholesale only." It is admitted by the United States (brief, p. 49), that

this definition was unduly restrictive. Not appearing by the findings to be a manufacturer "for wholesale only," this claimant would have been excluded by this regulation.

Had these regulations been prescribed, and this claimant had demanded the benefit of the law, his application would have been refused by the Treasury Department. A bond would not have been accepted under article 7 (p. 13); inspection would have been refused under article 12 (p. 15); license would not have been granted under article 14 (p. 16), and no officer would have been assigned under article 19 (p. 17). In other words, this claimant, though confessedly within the scope of the law, could not have conducted his manufacture under regulations, although regulations had been prescribed. He would therefore have presented himself before this court, as he does now, and would have been met by exactly the same argument, possessing the same force, that he could not recover because the alcohol was not used under regulations.

This would have presented the precise parallel of the case of *Morrill* v. *Jones*, 106 U. S. 466, where the party brought himself within the law but remained outside the regulations. It was held that he was entitled to recover. Are the rights of the claimant in this case any weaker because the Secretary of the Treasury has attempted to exclude from the benefits of the law not merely a part, but the whole, of the class defined by its terms?

Either the right rests on the law, subject to such lawful regulations as are made, or is in every respect dependent on the use under regulations. Yet it is seen that to hold to the latter, would put into the hands of the Secretary the unlimited power to tax or not to tax according to his own limitations and definition. This leads to the con-

clusion that the grant by Congress was complete and that the meaning of the words "under regulations" is "subject to regulations." If lawful regulations are prescribed, they must be complied with. If not prescribed, the claimant proves the facts required by the law, there being no regulations to follow, and is entitled to recover.

Authority Cited for the United States.

The appellant's opening brief (p. 54) called attention to the noteworthy fact that all the decisions, six in number, cited by the Court of Claims, were against the power, sustained by that court, of an executive officer, charged with making regulations, to make the statute ineffective by failing to make or enforce regulations. The Court of Claims held that this statute was without precedent. The evident need of one to support the decision is met by the Attorney-General by saying that (p. 12) "this court has more than once ruled upon such a provision," and by citing a single case,—*United States* v. *McLean*, 95 U. S. 750.

That case has no application to this for the following reasons:

1. The right before this court in the *McLean* case was a right to salary as postmaster. Such salaries have always been to a large extent under the control of the Postmaster-General. They are part of the postal administration. At the present day, with the exception of the salaries of the postmasters at New York and Washington, the salary of every postmaster in the United States is fixed by the Postmaster-General (act of March 3, 1883, 1 Supp. R. S. 417, 22 Stat. L. 600).

The subject matter of the present case is of an entirely different nature. It is one always reserved to the legislative power—the right of taxation. The jealousy with which this right is guarded from executive encroach-

ment is fully discussed in appellant's opening brief (pp. 56–63).

2. The language of the statute (brief for United States, p. 12) in express terms made the right to the increased salary dependent upon a readjustment by the Postmaster-General.

This is quite different from the language of the statute in the present case, which expresses no such intention, but merely gives a direction to the Secretary of the Treasury to prescribe regulations for enforcing the right granted by the statute.

3. The decision in *United States* v. *McLean* loses its authority in the light of later cases under the same statute. The Attorney-General insists that in that case this court held that there was no right of action for the salary, which ought to have been fixed by the readjustment of the Postmaster-General, although his duty was of computation alone, involving no discretion. But in the subsequent case of *McLean* v. *Vilas*, 124 U. S. 86, the case was examined on its merits, and it was held that the law in express terms vested discretionary power in the Postmaster-General as to fixing the salary; thus overruling the position taken in the original *McLean* case, that whatever may have been the claimant's right to a readjustment, he was without remedy, even though the duty imposed upon the Postmaster-General was mandatory.

The subsequent decision in *United States* v. *Verdier*, 164 U. S. 213, was also to the effect that the fixing of this salary was intended to be discretionary with the Postmaster-General. It was said (p. 216):

"It would seem that no readjustment could then be made until the lapse of two years, or until July, 1868, unless, upon satisfactory representation, it was deemed expedient by the Postmaster-General."

Again, referring to *United States* v. *McLean*, it was said (p. 220):

"In that case, as stated by Mr. Justice Miller in *McLean* v. *Vilas*, 124 U. S. 86, 87, this court held that the Court of Claims could not 'perform the duty of readjusting the salary under the acts which conferred that power on the Postmaster-General, and that there was no legal liability against the United States for the amount claimed by him until that officer had readjusted the salary in accordance with those acts of Congress'; and in *McLean* v. *Vilas* it was held that the statute did not contemplate a readjustment oftener than once in two years as a legal duty or obligation on the part of the Postmaster-General."

It is thus seen that the statutes in those cases and in this are very different. There the duty of readjustment was discretionary. Here the duty of prescribing regulations is mandatory.

4. The decision in *United States* v. *McLean* was not only departed from in the later cases, but was itself made with apparent regret at the time. It was said in the opening of the opinion (95 U. S. 751):

"The case of the claimant appears to be a hard one; but we think he has no remedy by suit in the Court of Claims."

For these reasons this doctrine should not be extended beyond cases not clearly covered by its terms, especially into branches of governmental law, where it meets the opposition of settled principles of constitutional construction.

Inoperative Statutes.

These constitute a new class, hitherto unknown to legal terminology. But, as the Attorney-General has insisted that this is such a statute, and has cited three

instances claimed to be in point (pp. 98–103), we shall discuss them in their order.

In the case of *Dunwoody* v. *United States*, 143 U. S. 578, powers had been conferred upon the National Board of Health; but acts subsequently passed in express terms limited the powers of that board to the expenditure of money expressly appropriated for it. This court said (p. 586):

"That made by the act of March 3, 1881, for 'salaries and expenses' of the board, was accompanied by a direction that no more money should be expended for the purposes of the various acts creating it, out of any appropriations previously made, or by virtue of any previous law; and the act of 1882 expressly provided that 'no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health.' These enactments evince the purpose upon the part of Congress not to create any liability upon the part of the United States, in respect to the work of the National Board of Health, beyond the amounts specifically appropriated by it from time to time for that work."

This decision, far from constituting authority for the position that the enforcement of a law is dependent upon appropriations holds that it is so dependent only when Congress expressly so enacts. In that case Congress had provided that the liability of the Government should be limited to appropriations thereafter made. The decision simply carried out the purpose thus expressed.

The Civil Service Act of March 3, 1871, 16 Stat. L. 514, authorized the President to prescribe regulations for admission into the civil service of the United States, and to employ suitable persons to conduct inquiries. It may be that the powers of the President were not as effectively exercised as they would have been had Congress continued to appropriate to carry it out. An act construed as the Attorney-General did this (13 Opinions

of Attorneys-General, 516) to be mainly for the purpose of properly informing the conscience of the appointing power to be properly informed—a purpose essentially discretionary—is widely different from a revenue law conferring upon the citizen the right "to receive from the Treasury of the United States a rebate or repayment" of a particular tax. It is unnecessary, however, to discuss that question with much detail, as that act was never brought to the test of judicial decision, and, therefore, the question whether it could or could not have been carried out without an appropriation for the purpose is a mere moot question.

As to the act of March 5, 1888 (25 Stat. L. 44) providing for the purchase of certain land and the buildings thereon, but for the payment of which no appropriation was made until April 24, 1888 (25 Stat. L. 90), the brief for the United States quite misapprehends the purport of the opinion of the Attorney-General (19 Opinions, 131), rendered after the passage of the former, but before that of the latter act. That opinion carefully refrains from holding the act inoperative. It directed the purchase of certain buildings and ground for a special purpose, but did not appropriate the purchase money. An act already in force, that of August 7, 1882, (1 Supp. R. S. 380, par. 1, 22 Stat. L. 305) provided:

"That no act passed authorizing the Secretary of the Treasury to purchase a site and erect a building thereon shall be held or construed to appropriate money unless the act in express language makes such appropriations."

Under these circumstances the Attorney-General held, (p. 132):

"I am therefore of the opinion that no appropriation is made by the act of March 5, 1888, for the objects designated therein and that you are not authorized to pay

the sum specified in that act until such appropriation is made."

He carefully refrained from holding that the act was inoperative in the sense of not permitting the purchase. The purchase could undoubtedly have been made under the former act, and the vendor would by the promise of that act have acquired a valid and enforceable claim against the United States for the purchase money.

2. Would Numerous Supervisors have been Required to Prevent Fraud?

This question is quite immaterial, as we have pointed out in our opening brief (pp. 72–76), but the great stress laid upon the expense and dangers of fraud in executing regulations, in the brief for the United States (pp. 50–66), will excuse some consideration.

The act upon its face affords no warrant for the assumption that Congress regarded a large force, or any force whatever, of inspectors or other employees additional to those already in the service, as necessary.

It has been officially reported (Senate Report 1141, 54th Congress, 2d Session, p. 45) under the similar law in force in Great Britain:

"The attendance at methylations and subsequent supervision does not constitute the exclusive work of any officer. Ordinarily the officer has a multiplicity of other duties, and the supervision of the methylation, or of the use or sale of methylated spirits may form but an insignificant fraction of his work."

The statement of an experienced officer of inland revenue of that country in the same report shows that serious frauds were virtually unknown, and that such frauds as were attempted led to nothing more than occasional modifications of the system. There is no more reason for the apprehension of fraud in this country than abroad.

The Burden of Proof on the Claimant.

There is no analogy between the so-called whiskey frauds and anything which could be attempted under the system of free alcohol in the arts established by § 61 of the act of 1894. The frauds committed upon the revenue in times past consisted in the evasion of payment of taxes by those from whom they were due, and not in securing the repayment or rebate of a tax first paid into the Treasury. Under the system established by § 61 every safeguard provided by pre-existing law for the collection of taxes on distilled spirits remained in full force and effect. Every dollar of that tax was required to continue to reach the Treasury as before.

No consideration has been given to the particularly favorable position of the Government under § 61. The affirmative of the issue was entirely upon the claimant. After paying his tax, he could get no rebate except by complying with the regulations issued and by satisfying the collector of his use of the alcohol. The regulations might fix any degree of proof or call for any stringency in the methods of satisfying the collector, so long as not clearly unreasonable. The Government thus had the power, not only to enforce stringent regulations, but to require the most comprehensive and conclusive possible evidence of the use. The tax remained in the Treasury until the collector should announce his satisfaction with the proof presented. The act contemplated that the burden of proof should rest upon and be discharged by the manufacturer, and the regulations might have been so framed as to require the completest safe-guards at the expense of the manufacturer to take the place of costly official supervision. The reduction of the ratio of expenses by taking due advantage of this superior statutory position would have been enormous.

Neither was it contemplated that a separate corps of officers should execute § 61. All the existing agencies of the internal revenue would have co-operated, with resultant economy of administration.

Any one claiming the benefit of that section could secure it only by making application, submitting his books and papers to inspection, himself and all his employees to interrogation, and by allowing every step of the process of manufacture to be examined at any required moment by an officer of the Government.

The regulations to be prescribed by the Secretary of the Treasury, by any fair construction, may provide by what character and amount of evidence the use shall be established to the satisfaction of the collector. Both the rules of evidence and its construction and effect, when offered, are within the full control of the officers of the United States. No claim can be paid through executive instrumentalities without the approval of the collector of internal revenue, who must be guided at every step by regulations prescribed by the Secretary. In case of doubt, he may properly leave the claimant to his legal remedy by suit.

The frauds referred to in the brief for the United States (p. 21) all consisted in evading the payment of taxes. If the smuggler or the moonshiner can only escape observation, he is safe. But a claimant is in a different position. He must come forward into the light of day, and submit to the recognized tests of truth. He must present testimony, and submit himself and his books and papers to examination to any required extent. He has no privilege behind which he can shield himself, like a defendant or an unwilling witness. The slightest attempt at concealment or evasion arouses suspicion. If even a suspicion were aroused on the part of the collector, he could not be said to be "satisfied."

To say that collectors of internal revenue would regularly allow fraudulent claims under any regulations as to evidence prescribed by the Secretary of the Treasury would be as unjust to them as it would be inconsistent with the history of that department of the public service.

Other classes of claims have been examined for many years in the Internal Revenue Office and as to all such other classes of claims it was only a just tribute to the management of that bureau which was paid by the Court of Claims when it remarked in the case of *Sybrandt* v. *United States*, 19 C. Cls. 461, 467 :

"The law as it is, however, has been in operation many years, and as yet no report of maladministration has reached the ears of the public."

The same remark applies to investigation by judicial process. Even were it true, as here claimed, that there is a peculiar danger of fraud in claims affecting the use of alcohol, that fact is proper for the consideration of the officers of internal revenue, or, in case a judicial remedy is sought, of the courts. The very fact that the present claimant is before this court to-day with a finding by the Court of Claims of every fact made material by the statute, rendered after a judicial scrutiny, the thoroughness of which is evidenced by the fact that the case was before that court for nearly three years, is a sufficient answer to the idea that an elaborate system of inspection is absolutely necessary before the facts attending the use of alcohol under § 61 can be properly established.

The Analogy Between Section 61 and the Customs Drawback Law.

In the brief for the United States (pp. 34–37), a contrast is attempted between § 61 and the customs drawback law

contained in § 22 of the act of August 28, 1894, 28 Stat. L. 551. This is a re-enactment of § 25 of the act of October 1, 1890, (26 Stat. L. 617, 1 Supp. R. S. 862), and that was an extension, after thirty years of experience, of R. S. § 3019. The section provides for the allowance of drawbacks of customs duties upon imported articles entering into the manufacture in the United States of articles subsequently exported Elaborate regulations have been made under this act by Articles 734 to 802 of the Customs Regulations of 1892, and modified from time to time. A manufacturer desiring benefit of drawback has to apply to the Treasury Department for a rating of the manufactured article. Samples of the article are submitted and the Treasury Department submits these to analysis, mechanical or chemical, as may be necessary, and determines a maximum rate of allowance based upon the minimum of the imported article necessary for the completion of a given quantity of the manufactured article to be exported. The collector of customs is thereupon ordered to admit this article to drawback at the rate fixed in the regulations specially applicable to it. No supervision of manufacture is exercised.

The manufacturer is obliged to show by affidavit of the importer, which is verified from the customs records, that a given quantity of the article upon which drawback is claimed was imported and sold by him. When the article is manufactured, the claimant for drawback gives notice to the Collector of Customs that he is about to export, stating how many packages and by what steamer, and the inspector of customs satisfies himself by inspection of the goods on the dock and by examination of the steamer's manifests, of the quantity of the goods exported. He also takes samples as requisite, and these are submitted to the customs authorities, who determine whether the samples are equal to the standard already prescribed.

The claimant also furnishes the evidence of persons actually engaged in the process of manufacture, showing the use of the foreign article in the domestic manufacture. If the proofs are satisfactory the drawback is paid at the rate originally prescribed by the Department.

Among the articles admitted to drawback (see Treasury Department circular 120, Division of Customs, August 1, 1896) are the following on which a drawback is allowed of the tariff duty upon the foreign alcohol specially imported for use in the articles manufactured for export.

Ayer's Cherry Pectoral and Sarsaparilla (p. 3).
Barry's Florida Water, Pain Relief and Tricopherous (p. 4).
Borine (p. 5).
Burnett's Extract of Lemon, Cochineal, and Essence of Jamaica Ginger (p. 6).
Celery Rock and Rye Cordial or Celery Tonic (p. 6).
Fluid Extract of Witch Hazel (p. 11).
Fluid extracts (pharmaceutical preparations) (p. 11).
Maltine (p. 17).
Perry Davis' Pain Killer (p. 19).
Toilet Waters, cologne, Florida and others (p. 32).
Varnish (p. 32).

It needed only an adaptation of this system by the Internal Revenue Bureau to secure suitable regulations for the rebate of tax on alcohol under § 61.

An effort is made to show some difference between the object of regulations under this law and under § 61. Under the customs law, the claimant has to prove the use of the imported article in the manufacture and its export. Under § 61, he has to prove only its necessary use in the arts. In the one case, the object of regulations is to ascertain the quantity of the article used, its identity with the article imported and its exportation. In the

other it is the quantity of the alcohol used and its identity with that on which the tax shown by the stamps has been paid. In either case, the conditions of the right are fixed by the statute and the regulations are solely to furnish a means of ascertaining the facts. In the one case, it is admitted that, if lawful regulations fail to be prescribed or executed, the facts may be ascertained by a court. The same rule must be here applied.

Statutes Against Fraud.

It seems useless to extend this discussion caused by the argument for the Government that the section was intended by Congress to be inoperative because of the dangers of fraud in its execution. But we point out various penal statutes of the United States which would be violated in the various possible modes of attempting to assert a fraudulent claim under § 61 or to recover alcohol used in the arts on which a rebate had been paid.

R. S. § 3256, prescribing a penalty of double the tax for evading payment of tax on distilled spirits.

R. S. § 3257, providing fine and imprisonment for a distiller defrauding the United States of tax.

R. S. § 3258, imprisonment for having in possession a still without registration.

R. S. § 3265, fine and forfeiture for setting up a still without permission.

R. S. § 3281, as amended by act of February 8, 1875, § 16, 1 Supp. R. S. 60, 18 Stat. L. 310, fine, imprisonment and forfeiture for carrying on business of rectifier or wholesale or retail liquor dealer without paying tax.

R. S. § 3296, fine and imprisonment for removal of distilled spirits to a place other than the distillery warehouse or in any manner other than provided by law.

R. S. § 3305, fine and imprisonment for making false entries or omitting entries in distillers' books.

R. S. § 3318, amended by act of March 1, 1879, § 5, 20 Stat. L. 339, 1 Supp. R. S. 233, fine and imprisonment for fraud by rectifiers.

R. S. § 3319, fine and forfeiture for a rectifier or liquor dealer to purchase distilled spirits in quantities greater than twenty gallons from unauthorized persons.

R. S. § 3324, fine and imprisonment for drawing off distilled spirits from the cask without effacing the mark, stamp and brand; forfeiture by transportation company for having in possession any empty cask having any brand, mark or stamp required by law on packages of distilled spirits; fine and imprisonment for removing stamp from a package of distilled spirits without defacing or destroying it, or for having stamp in possession or for having in possession any cancelled or used stamp.

R. S. § 3325, forfeiture for purchasing or selling any cask or package with inspection marks thereon.

R. S. § 3326, fine and imprisonment for altering stamp, brand or mark on any cask containing distilled spirits or putting in spirits of greater strength than indicated by inspection mark or fraudulently using marked cask for selling other spirits.

R. S. § 3455, fine and imprisonment for selling, giving away, purchasing or receiving package stamped, branded or marked so as to show that its contents have been inspected or tax paid thereon, if the package is empty or contains anything else than the contents which were therein stamped, or for making such marked package.

R. S. § 3456, fine and forfeiture for distiller, rectifier or wholesale liquor dealer neglecting to do the things required by law.

In addition to these, by R. S. § 3429, penalties are provided for altering or counterfeiting stamps or having in possession washed or altered stamps, and by §§ 5413 and 5414, fine and imprisonment for counterfeiting or alter-

ing any obligation of the United States, including stamps and other representatives of value.

R. S. §§ 3490–3494, penalty of $2,000 and double the amount lost by the United States for presenting a fraudulent claim, and action by informer authorized.

R. S. § 5438, fine and imprisonment for presenting a fraudulent claim or false evidence in its support or conspiring to defraud the United States.

Attempts to commit fraud under § 61 could not have escaped one or more of these penalties.

Difference Between Provisions Rejected and Provisions Adopted.

We fully agree with the position taken on behalf of the United States (brief, p. 43) that the action of Congress in rejecting one provision for use of alcohol in the arts free from tax and adopting another shows that the problem was *how* to permit such use without detriment to the revenue.

The provisions of the bills introduced and discussed in 1882 and 1888 and again in 1894, the very day before the adoption of § 61, while intended to effect the same object as § 61, were framed upon a radically different theory. All provided for the use of alcohol in the arts by a system under which the alcohol is delivered free of tax. It is necessary to keep it under oversight until used or exported in the manner contemplated by the law.

Under such a system the revenue was perhaps more exposed to the dangers so graphically set forth in the brief of the Attorney-General, and hence a strict system of supervision was not unnaturally required by the amendment itself. Section 61 proceeds upon a totally different idea and therefore contains no provision for such a system.

The elaborate argument of the Attorney-General (pp.

55–62) that because supervision of manufacture is required in bonded warehouses it must necessarily have been contemplated under § 61, forgets that the bonded warehouse system was the very one rejected by the Senate the day before the adoption of § 61.

Precautions necessary where manufacturing free of tax in the first place was contemplated were not by any means imperative when the tax was first paid, and was then to be refunded on evidence satisfactory to the collector of internal revenue.

3. Legislative Construction by Inaction.

The defense ingeniously elaborated in the brief of the Attorney-General in support of the position that § 61 of the act of 1894 was designedly made inoperative by Congress, involves a rule of statutory construction as extraordinary as has ever been submitted to a court of justice. It is that when an officer of the Government regards it as undesirable to carry a particular statute into execution without further legislation, he need only inform Congress of that fact, and await such further legislation. Then, if Congress do not act in accordance with his wishes, the act is inoperative. This statement might be regarded as satirical but for the fact that it is propounded in the brief (pp. 33, 34) in terms varying but little from those which we have used:

"When, therefore, a statute calls for action by an executive officer, and he reports that such action is impracticable until Congress has taken further steps, and that in the meantime the law must remain inoperative, and Congress does nothing further, the conclusion is irresistible that the understanding of Congress as to the operation of the law is and was all along the same as that of the Executive, and that it did not intend, even at the time that it enacted the law, that it should go into practical effect

unless the Executive took such action as its provisions called for."

What would happen if the Secretary refused to carry out the second law is not stated. Presumably Congress would be required to adopt a third enactment, before the will of that body, expressed in constitutional forms, could be carried into effect. It may well be asked, to what purpose are courts established if the enforcement of the laws against recalcitrant officials must be left to additional legislation.

It is admitted in the brief of the Attorney-General (p. 30) that no formal estimate in the manner required by law was made for the expense of carrying out § 61. With a frankness as remarkable as it is praiseworthy, it is also admited (p. 30) that this failure

"was possibly due to the fact that he did not believe that Congress when once informed of the expenditure required would make any appropriation."

In other words, this law was not treated as any other law, to be carried out with the means available, and an estimate to be made in legal form for such additional expenses as were necessary.

Indeed, the assumption underlying all the arguments of the brief for the United States is that the present act is not to be treated as other acts of Congress, but is of a different character, requiring special rules of construction.

Inasmuch as the brief of the Attorney-General has (p. 25, note) challenged the summary given on page 70 of the brief for appellant of the communication of the Commissioner of Internal Revenue of January 9, 1895, it is deemed proper to print the whole of this communication in an appendix to this brief, as illustrative of the spirit in which this act was treated by the officers of the Treasury charged with its enforcement. This statement

does not constitute in the Treasury technical sense an estimate, and could not be so treated in Congress. It is argumentative in form, exaggerated in statement, and varies in its computations of the amount required from $500,000 to $10,000,000. Seldom, if ever, is any action by Congress based upon communications of such a character, especially when of a tone calculated to discourage, rather than to ask for, appropriations for the enforcement of existing laws.

The Action of Congress on the Income Tax.

The remarkable character of the rule of statutory construction required to support the position of the Government in this case is further illustrated by the arguments in the brief (pp. 28–34) based upon the action of Congress in regard to the income tax and the distribution of seeds.

In estimating for the expenses of the income tax (H. R. Ex. Doc. 13, 53d Congress, 3d session, p. 4) the Secretary was careful to follow the directions of the act of July 7, 1884, 1 Supp. R. S. 470, 23 Stat. L. 254, prescribing the method of transmitting estimates to Congress, but made no such estimate for the enforcement of § 61. No case can be found in which it was ever suggested that an appropriation for administering one law was "a very strong indication of the intention of Congress that" another "should not be carried into effect" (brief for United States, p. 29).

As for the enactment of further legislation to enforce the law for the distribution of seeds, there is nothing remarkable about the fact that Congress took determined action on a subject coming so closely home to the personal knowledge of every member. From the fact that peremptory action was taken by Congress confirming by amendment a long standing construction of a somewhat ambiguous

statute, no argument can be drawn as to the construction of some other statute which that body failed to amend.

4. Alcohol on which Tax was Paid Before August 28, 1894.

The act does not exclude alcohol on which the tax was paid before August 28, 1894. This was at 90 cents instead of $1.10 a gallon. Its terms are unlimited in their description of the alcohol. A rebate is promised to the manufacturer who finds it "necessary to use alcohol" without qualification as to the date of payment of tax. The use "in the arts" is the consideration on which the promise is made. He is to satisfy the collector "that he has used such alcohol"; and, upon delivery of the stamps "to show that a tax has been paid thereon," he is to receive a "repayment of the tax so paid." The stamp showing payment of the tax is the measure of his right. The repayment is of the tax shown by the stamp to have been paid. Whatever tax was paid is to be refunded.

As there is no limitation expressed in the section from which an inference can be drawn that the rebate is limited to alcohol on which the tax had been paid after the passage of the act, equally so is there nothing implied in the section from which such an inference can be drawn. Neither does the brief for the Government (pp. 104–111) refer to a single other statute supporting such an inference.

The contention is that this limitation is necessarily implied in the act, although not expressed. This means that it is a necessary inference that Congress meant to do something else which the words do not express. If these words had been expressed, they would have been:

"But no rebate shall be paid if the tax was paid on the alcohol prior to the passage of this act."

It is a necessary corollary of the Government's position that these words would have been expressed if Congress had thought them necessary for a complete declaration of its purpose. But, if it can be shown that the expression of the words which the Government says are implied, would result on their face in so absurd consequences that Congress would have rejected the words had they been offered, then it must be admitted that they could not have been implied (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 472). The briefest consideration shows the absurdity of their result and would have caused their rejection by Congress.

The consequences would have been these:

(1) If a manufacturer had on hand upon the passage of this act alcohol on which but ninety cents tax had been paid and used it, he would forfeit the rebate; while his trade competitors who had no stock of alcohol on hand would receive it. Can it be conceived that Congress meant to create such a condition?

(2) Instead of using this alcohol he could have carried it back to the dealer from whom he purchased it and have procured from him, after suitable delay, other alcohol on which the tax had been paid after August 28, 1894. Would it not have been absurd to require him to make this exchange?

(3) If he had no alcohol on hand and wished to use alcohol under this section, he would have been obliged to discriminate in his purchases and to buy alcohol on which the tax had been paid after August 28, 1894, leaving that on which the lower tax had been paid to be used in compounding beverages. Is not this an equally absurd consequence?

(4) If he had foreseen the possibility of this objection, and for abundant caution had used only alcohol on which the tax had been paid after August 28, 1894, the

Government would have been obliged to repay a tax of $1.10 a gallon on all alcohol used instead of 90 cents on that earlier paid. This consequence must seem absurd from the standpoint of the Treasury.

(5) If he had used alcohol without distinction, instead of receiving his rebate out of the rate of tax paid, he now finds that he receives all the rebate claimed at the higher rate and nothing at the lower rate. This is an absurd result of making a moderate claim.

The sensible manufacturer, foreseeing these absurdities, without notice in the words of the statute of any distinction, used alcohol without regard to the date of payment of tax. Any construction would fall far short of the "perfection of reason" which would compel him to lose all rebate, because he used that on which the Government would repay him the lesser sum.

These being the consequences, the question is presented,—would Congress have passed in express terms such a provision? And the answer must be that no such foolish act would have been passed.

There is a sound reason for the claimant's construction, aside from the fact that the terms of the act plainly require it. The promise of the act is not to the distiller when he pays the tax, because he does not use the alcohol in the arts; nor is there an unconditional promise to the manufacturer when he buys it. The promise is that if the manufacturer uses alcohol in the arts, the tax shall be repaid. When the use occurs after the promise, the right accrues.

This is not a case where an absurd consequence results from the plain language of the law. The language here does not authorize this construction. It must be read into it by implication. The rule of statutory construction which the Government would need to support its contention would be something like the following:

"Absurd consequences may be implied in statutes, although not expressed."

5. Miscellaneous Considerations.

Policy of Free Alcohol in Congress.

That portion of the brief for the United States (pp. 82–85), treating of the policy of free alcohol in the arts, has already been so fully treated in the brief for the appellant (pp 4–17), that we hardly need add any thing to what is there said.

A correction must, however, be made of the statement (p. 83) that the House of Representatives voted to increase the spirits tax from 90 cents to $1.10 per proof gallon without making any exception in the case of alcohol used in the arts. The House voted to increase the tax from 90 cents to $1. The Senate returned the bill with an amendment increasing that tax to $1.10 and another allowing the use of alcohol free in the arts. Thus, the rate of $1.10 was throughout coupled with the remission of tax on alcohol used in the arts.

Construction Contended for by Claimant Requires No Change of Reading in Statute.

It is suggested in the brief for the United States (p. 37) that the construction contended for by the claimant requires the insertion of a new term into the statute, to the effect that the manufacturer may use alcohol

"under regulations to be prescribed by the Secretary of the Treasury if he prescribe any, but, if he do not, then the manufacturer may use alcohol without being subject to any regulations whatever."

The view contended for by the claimant in this case involves no such reconstruction of the statute. What the statute directs, it means to have done. The purpose

of the law was that the Secretary of the Treasury should carry out its intention. It was not within the contemplation of Congress at the time of enacting this statute that the Secretary of the Treasury would refuse to comply with the legislative will. It was assumed as of course that he would obey it. To that extent, therefore, there was a condition of things not expected by Congress when passing the act. But it can not be said that the laws of the United States, taken as a whole, regard such a condition as impossible, or fail to provide for it.

The power of the Secretary of the Treasury to make regulations under the special provisions of § 61 of the act of 1894 is hardly broader than that conferred by Revised Statutes, § 251, that

"he shall prescribe * * * rules and regulations not inconsistent with law to be used under and in the execution and enforcement of the various provisions of the internal revenue laws."

Under this provision the power of the Secretary of the Treasury to make regulations touching the subject of § 61 could not be doubted, even if that section made no reference to him. The special provision of § 61 merely confirmed the power already conferred by general law.

A possible failure by the head of any Department to carry out the provisions of law is contemplated and a remedy afforded to those whose individual interests are injuriously affected by his failure by the provisions of the acts conferring jurisdiction upon the Court of Claims of

"all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort,

in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" (act of March 3, 1887, 1 Supp. R. S. 559, 24 Stat. L. 505).

Surely it can not be necessary in the enactment of any law requiring executive action to make special provision for the failure of executive officers to carry out their duties. Wherever the party for whose benefit a law was enacted brings himself within its provisions by doing the act upon the performance of which the right to receive money is vested, he brings his claim under a "law of Congress." A failure of the executive officer to take the steps for the ascertainment of the amount due, so far from depriving the Court of Claims of jurisdiction, furnishes the very occasion for its exercise.

Primarily, it was contemplated by this law that the manufacturer should be under regulations. It could not be presumed in advance that an executive officer would refuse to comply with a plain duty imposed upon him by mandatory provisions. That expectation having been disappointed, and every possible step having been taken by the party of the class named in the statute to bring himself within its provisions, he may safely rest upon the promise contained in the statute, and invoke through the courts the legal right thereby conferred, "to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

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APPENDIX.

LETTER OF COMMISSIONER OF INTERNAL REVENUE TO SECRETARY OF THE TREASURY, PUBLISHED IN SENATE EXECUTIVE DOCUMENT NO. 34, 53D CONGRESS, 3D SESSION, PP. 2, 3, AND IN ANNUAL REPORT OF THE SECRETARY OF THE TREASURY FOR 1894, PP. 991, 992.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C. *January 9, 1895.*

Hon. JOHN G. CARLISLE,
Secretary of the Treasury.

SIR: In reply to your inquiry for an estimate of the expense of the administration of § 61 of the act of August 28, 1894, pursuant to the United States Senate's resolution of the 4th instant (which is herewith returned), I would say that nothing has come to my notice since November 28, 1894, the date of my last letter to you relative to this matter, which leads me to believe that the expense of official supervision was at that time overestimated.

It was stated in that letter that the expense of the necessary official supervision would not be less than $500,000 per annum. This estimate was based upon the number of officers required whose duties would be similar to those required of storekeepers and gaugers. There are about 1,600 distilleries in the United States requiring the services of some 1,200 storekeepers and gaugers, and 650 storekeepers who were paid last year $1,200,000, at a rate of compensation ranging from $2 to $4 per day.

It was estimated that if the number of manufacturers could be reduced by regulation to 1,600, a number equal to the number of distilleries, and if these officers could serve as to these manufacturers more economically than they serve as to the distilleries, the expense for this service would not be less than $500,000 per annum.

Since November 28, 1894, I have obtained further information in regard to the use of alcohol by druggists and by manufacturers of patent medicines, and feel warranted in

estimating the number of druggists who are now in the habit of buying alcohol in distillers' original packages, or other packages containing each 40 gallons or more, at 3,800, and the number of patent-medicine manufacturers at 200. It is not seen from these figures how the number of the favored class as to those who use alcohol in any medicinal or other like compound could well be less than 4,000. In fact it is not clearly seen how any discrimination could be made against any druggist who makes medicinal or other like compounds in which (as happens in the business of all or nearly all druggists) alcohol is a necessary component part. It is true that druggists whose business does not warrant the purchase of the ordinary distillers' original 40-gallon package of alcohol, have heretofore usually purchased their supplies in small packages put up from distillers' packages by rectifiers and liquor dealers.

As, however, distillers' original packages may, under the internal-revenue laws, contain as small a quantity as 10 wine gallons, it would seem that most druggists who have heretofore obtained the alcohol to be used in the manufacture of tinctures and extracts from liquor dealers will buy directly from the distillers or from those who deal in distillers' original packages, containing 10 wine gallons each. How can it be said that a manufacturer is not a manufacturer because the amount of business done by him is small? There being no special statutory definition in this instance, no such discrimination could be made by the Treasury Department.

This being the case it would seem that the number of manufacturers who daily, Sundays not excepted, use alcohol in medicinal or other like compounds would be more nearly 32,000 than 1,600, involving an outlay of $10,000,000 rather than $500,000.

Nevertheless, although these small druggists are required to make up these medicinal compounds at all hours of the day and night and Sundays, their great number affords an opportunity for economical official supervision not otherwise possible. Even with this advantage, however, when the fact is also taken into account that the operations of photographers, manufacturing

chemists, perfumers, manufacturers of flavoring extracts, hatters, paint and varnish manufacturers, manufacturers of tobacco and cigars, of woolen goods, of carpets, of mince meat, and of glue, would necessarily also be brought under the same surveillance when the use of alcohol in such arts and manufactures is claimed, it would seem to be improper to estimate the expense of an efficient administration at less than $1,000,000 annually.

Respectfully yours,

JOS. S. MILLER,
Commissioner.